IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

U N I T E D S T A T E S	)	**SUPPLEMENT TO THE**
	)	**DEFENSE MOTION FOR**
v.	)	**APPROPRIATE RELIEF UNDER**
	)	**MILITARY RULE OF**
MANNING, Bradley E., PFC	)	**EVIDENCE 505**
U.S. Army, (b) (6)	)	
Headquarters and Headquarters Company, U.S.	)	
Army Garrison, Joint Base Myer-Henderson Hall,	)	DATED: 29 February 2012
Fort Myer, VA 22211	)	

RELIEF SOUGHT

1. PFC Bradley E. Manning, by and through counsel, moves this court, pursuant to R.C.M. 906 and Military Rule of Evidence (M.R.E.) 505 to issue a Protective Order under M.R.E. 505(g)(1).

BURDEN OF PERSUASION AND BURDEN OF PROOF

2. As the moving party, the Defense has the burden of persuasion. R.C.M. 905(c)(2). The burden of proof is by a preponderance of the evidence. R.C.M. 905(c)(1).

FACTS

3. The Defense incorporates those facts referenced in Appellate Exhibit IV.

4. On 24 February 2012, the Defense contacted the Government in an effort to collaborate on the proposed content for the Court Protective Order. The Defense's goal was to clarify the Government's position, and ensure that the parties could agree on the basic issue that needed to be resolved – i.e. who should decide whether a given submission contained classified information. The Defense's position was that the Government should not be in a position where it unilaterally decides whether something that the Defense or the Court submits constitutes spillage. Instead, the Defense submitted that the parties needed to identify a neutral third party, such as the Court Security Officer, to be given this interpretive role. [*See* Attachment A for entire email exchange].

5. The Government responded to the Defense's email by stating that it was in the process of consulting with various stakeholders and would have a draft protective order for the Defense's review in about a week. The Government expressed confusion over the Defense's use of the word "Government" in its email. In particular, the Government stated, "What is confusing is

your use of the word 'government.' If you mean the prosecution, then we agree. If you mean the United States Government, then we disagree because an OCA, or their delegate, is the ultimate authority on what is classified when it comes to their classified information."

6. The Defense clarified that the use of the word 'government' was intended to be synonomous with 'prosecution.' The Defense then reiterated its position and asked the Government to clarify its basic position on the issue. The Government responded by stating it would be "impossible" to answer the Defense's question without having "a few days to speak with the OCA or their representatives."

7. Frustrated by the Government's failure to state (even in one sentence) its basic position, the Defense clarified that it was really just looking for a "yes" or "no" answer to the following question: "Is it your position that the CSO (and not trial counsel) will work with the OCA to determine if a filing contains classified information?" The Defense informed the Government that it needed an answer to this question so that it could prepare accordingly.

8. The Government again responded that it intended to get the Defense an answer by "the middle to the end of the week" once it spoke with the OCAs or their representatives about the issue.

9. Due to the Government's nonresponsive answer, the Defense reiterated to the Government that it was simply looking for an answer regarding whether the Government envisioned a role for the CSO or not. The Defense informed the Government that if it could not even provide the Defense with the Government's basic position on this critical issue (i.e. who reviews and determines whether a document contains classified information), then it did not seem that the Government was amenable to working together on the issue.

10. The Government responded that it disagreed and believed that the Government and Defense could work together on a solution. However, the Government maintained that it had to "consider all equities involved" and that the "prosecution represents the United States government and its collective interests." The Government stated that before it could commit to a course of action it "MUST figure out the process, who would be involved, and consider all courses of action (as directed by the military judge)." The Government then stated that it was "exploring all the different methods to allow for efficient and safe submissions of documents to the court" and "should have a proposed way forward by the middle to end of this week, which we intend to share with you for comment, in an effort to work together for a final product."

11. The Defense subsequently informed the Government that it believed the Government was unnecessarily making the process more difficult than it needed to be. Because of the Government's continued refusal to answer a basic question, the Defense informed the Government that it would proceed with a separate course of action.

12. The Government replied that it thought it was "unfortunate that within one duty day of our hearing, you [the Defense] have made the decision not to work together on this issue." The Government stated that "although your question seemed simple to you and the defense, the prosecution is not in the position to commit to a course of action without first consulting with

entities that would be required to actually conduct the work that you propose or that COL Lind suggested, such as an OCA representative consulting with the CSO or a CSO equivalent, communicating over a secure network, etc." The Government then informed the Defense that it would "diligently work this week to develop a proposed plan" and would submit the plan to the Defense for comment prior to submitting it to the Court.

13. The Defense reiterated, yet again, the fact that it was not looking for a commitment by the Government to a course of action, but simply an agreement on the basic issue we were trying to resolve. Additionally, the Defense stated the Government's process in drafting a protective order and then submitting it in a week for the Defense's comment did constitute "working together" with the Defense.

14. The Defense believes that the Government's responses are clearly obstructionist. It is impossible to believe that the Government cannot commit, without input from the OCAs, to: a) identifying what the issue is that needs resolving; and b) stating its basic position on the issue. The Defense was not seeking the Government's position on the logistics of the process, but merely its starting point for the protective order. If parties are asked to work together to build a vehicle, but one wants to build a car and the other to build a bicycle, it is unlikely that the process will be a productive one. Without knowing whether the Government is building a car or a bicycle, the Defense is at a distinct disadvantage in the process.

WITNESSES/EVIDENCE

15. The Defense requests the following witnesses be produced in support of this motion:

a. OCA for Specification 3 and 15 of Charge II;
b. Mr. Jay Prather, Court Security Officer

LEGAL AUTHORITY AND ARGUMENT

16. The Defense relies upon the legal authority and argument advanced in Appellate Exhibit IV.

17. The Defense seeks the issuance of the revised Protective Order in order to achieve the following basic goals:

a. To avoid a reoccurrence of the 14 February 2012 claimed "spillage" of classified information;

b. To propose a process that protects the Defense from the Trial Counsel unilaterally deciding whether a Defense filing contains classified information[1];

[1] The Defense believes that the Trial Counsel has an inherent conflict of interest with regard to whether a Defense submission contains potentially classified information. By calling "spillage" on the Defense, a Trial Counsel could: a) embarrass the Defense by publicly disclosing that the Defense had improperly disclosed classified information (as at the Arraignment); b) threaten to suspend security clearances, as it has in the past; and c) call into question the

c. To propose a process whereby the Defense and the Court are similarly-situated in terms of their respective obligations and protections in the event of an inadvertent spillage;

d. To propose a process that does not add unnecessarily onerous requirements on the parties.

18. This is not the first court-martial to involve classified information. The Court and the parties have dealt with other cases involving classified information. With experience as our guide, there is no reason to create an overly elaborate process for what should be a rather straightforward issue.

19. At the outset, the parties and Court should be entitled to rely upon their respective security experts to determine whether a specific filing contains classified information. It is the job of the identified security experts for each party and the Court to advise on proper classification decisions and to ensure that classified information is properly protected and marked. Once the parties and Court have obtained assurances from their independent experts that a filing does not contain classified information, the following process should control:

a. The Court may immediately submit its filing;

b. The Government may immediately submit its filing pursuant to local rules;

c. The Defense must submit its filing (other than strictly procedural filings) to the Court Security Officer for his concurrence. If the Court Security Officer concurs with the Defense experts that the filing by the Defense does not contain classified information, the Defense submits its filing pursuant to local rules. If notwithstanding the "blessing" of the CSO, the Trial Counsel (in consultation with the OCA) believes a filing by the Defense ***or*** the Court contains classified information, then this determination will control. If such a determination is made, the Defense or the Court will not be deemed to have intentionally or negligently released classified information.

20. The Defense has drafted a revised proposed Protective Order. *See* Attachment B. The revised Protective Order details appropriate procedures to protect classified information while still ensuring an efficient and effective court-martial process. *See generally*, M.R.E. 505(g)(1). If the Defense motion is opposed by the Government, then the Defense requests oral argument.

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professionalism and ethics of the Defense. In short, making the Trial Counsel the arbiter of potential spillage and the giving the Trial Counsel the ability to argue such a spillage was intentional puts too much power in the Trial Counsel's hands. [Note: I have deliberately used the expression "Trial Counsel" rather than "Government" since the Government expressed confusion on this point].

CONCLUSION

21. Based on the above, the Defense requests that the Court issue the attached Protective Order.

Respectfully submitted,

DAVID EDWARD COOMBS
Civilian Defense Counsel